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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-1545

ANN ZIPES, PAT SANTINI and PAMELA DAILING, INDIVIDUALLY AND ON BEHALF OF A CLASS,
Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JAMES A. VELDE,
One First National Plaza,
Chicago, Illinois 60603,
Attorney for Respondent.

Of Counsel:
LAURENCE A. CARTON,
GARDNER, CARTON & DOUGLAS.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent has filed a cross-petition for certiorari, docketed as No. 78-1549, which is conditioned upon the grant of certiorari in this case, Docket No. 78-1545 (See pp. 1 and 6-7 of cross-petition in No. 78-1549).

SUPPLEMENTAL STATEMENT OF THE CASE.

Petitioners' Statement of the Case is materially inaccurate.

The class members were described in the complaint, petitioners say, "as including all TWA hostesses who had been

fired on account of parenthood after July 2, 1965."[1] Petitioners omit the currently employed flight attendants from the class. The omission is significant because of their next statement that respondent's answer "explicitly admitted that the Court had jurisdiction." The admission did not apply to class members who had failed to comply with the jurisdictional prerequisites of time limit compliance of Title VII of the Civil Rights Act of 1964. The largest class of members—several thousand currently employed flight attendants—had complied with the time limit since they had not been terminated for pregnancy but were working and potentially subject to the allegedly illegal practice at the time the EEOC charges were filed. The admission of subject matter jurisdiction under § 706(f) of Title VII thus applied to them, but not to all class members.

Contrary to petitioners' statement that respondent "made no assertion of any time-filing defense," respondent's answer put in issue the failure of class members to comply with the requirement for filing charges with the EEOC. The complaint alleged[2] that the plaintiff union filed a charge of illegal discrimination with the EEOC on June 1, 1970. Respondent's answer alleged

1. However, the class description was "all female flight cabin attendants similarly situated currently employed by Defendant and/or employed by Defendant at any time since July 2, 1965" (I Supp. 8). Class members were not alleged to have been terminated "on account of parenthood" but "when such female persons . . . became pregnant" (I Supp. 9). This inaccuracy, though not material in this Docket No. 78-1545, is important in Docket No. 78-1549, as is petitioners' incorrect reference (p. 3) to "respondent's male flight cabin attendants." There were none in 1970, as explained in respondent's cross petition (pp. 8-10) in Docket No. 78-1549.

2. Complaint: "11. On or about June 1, 1970, the Plaintiff Union filed a charge with the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) alleging the aforesaid unfair employment practices. The EEOC notified the Plaintiff Union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court, as provided in 42 U. S. C. 2000e-5(e) and (f). The Plaintiff Union has its offices in the State of Illinois. Illinois does not have a law prohibiting the unlawful employment practices complained of herein." (I Supp. 10.)

it had no knowledge or information sufficient to form a belief as to the truth of this allegation.[3]

Petitioners' statement, with a quotation from the transcript (Petition A-28), that respondent's lawyer "explicitly waived any question of the statute of limitations" at the settlement hearing in March 1972 ignores the fact that the waiver was conditioned upon the approval of the settlement. Petitioners' quotation omits two immediately preceding paragraphs of the transcript explaining that the time limit would be raised if there were no settlement.[4]

Petitioners' statement that respondent "made no mention of any jurisdictional question" during the appeal from the settlement approval mistakenly assumes that a time limit is not jurisdictional. The briefs (Seventh Circuit Court of Appeals Nos. 72-1335, 1336, 1339, 1503) discussed the Title VII time limit as an obstacle to recovery if the settlement were overturned and the case were to be litigated. See Brief for Defendants-Appellees (pp. 62-64); Brief of Appellee ALSSA (p. 42). Petitioners themselves (Reply Brief of Appellants pp. 25-28) discussed the issue, arguing (p. 28) that time limit noncompliance was an affirmative defense that defendant had not pleaded.

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3. Answer: "11. Defendant admits the allegations of paragraph 11, except that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 that on or about June 1, 1970, plaintiff union filed a charge with the EEOC alleging unfair employment practices, and that the EEOC notified plaintiff union on July 31, 1970, that it was entitled to initiate a civil action in a United States District Court." (I Supp. 20.)

4. "Mr. Carr: All of these girls, as I say, want to go back to work, and here are girls as to whom there is a great deal of doubt, as to whether or not—Mr. Feldman has estimated that 90 per cent would [not] have a right to go back to work, and incidentally, we have been prepared, if we ever got to the issue, to raise these points on the particular girls.

"Many of these girls have slept for five or six years on their rights, without ever doing anything about them. Mr. Feldman said there is a question as to 90 per cent of them having a right to go back to work." (II Supp. 471.)

After the case was remanded following this Court's denial of review in May 1974, defendant moved to amend its answer to plead noncompliance with the time limit as an affirmative defense. This was done in September 1974 at the first status call after the remand. Petitioners' Statement of the Case says of this amendment, "TWA first presented its defense under § 706(d) in the form of a motion for leave to amend its answer." On the contrary, respondent's answer in September 1970, by pleading no knowledge, denied petitioners' allegation of the filing of the charge with the EEOC, as noted above.

REASONS FOR DENYING WRIT.

The single issue presented by the certiorari petition is whether the Title VII time limit is subject to waiver and estoppel. But the waiver and estoppel argued by petitioners are disproved by facts their petition omits, as explained in Point I of this answer. The "conflict in the circuits" on this issue, asserted by petitioners, is not relevant in this case, as explained in Point II.

I.

Record Disproves Waiver and Estoppel.

A. No Excuse for Noncompliance with Filing Requirement.

The number of allegedly illegal terminations of approximately 400 petitioners occurred during years as follows:[5]

1965 (after July 2)	30
1966	76
1967	78
1968	112
1969	88
1970 (before March 1)	2

Although these petitioners seek years of backpay under paragraph (g) of § 706 of Title VII, they neglected until May 31,

5. Compiled from III Supp. 89-98.

1970 to file the EEOC charges which paragraph (d) required them to file within ninety days "after the alleged unlawful employment practice occurred."

Petitioners have never attempted to excuse their failure to file EEOC charges until May 31, 1970. Their neglect is emphasized by unusual affirmative evidence. In March 1972 their then counsel, referring to the Spring of 1970, conceded that the class members "had never made any protest to the Union or, as far as I know, to anybody else about their discharges" (II Supp. 319, 328, 336).

Each of the claims, estimated by petitioners' counsel in 1972 to average $7,500 per year (II Supp. 295), involves the adjudication of many factual details under § 706(g), as whether termination was for a non-discriminatory reason, whether work was discontinued for family reasons, the amounts earned or "earnable with reasonable diligence" after termination, etc. Petitioners' years of neglect make this a classic case for denying recovery under the centuries-old maxim, "the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."[6]

The facts of petitioners' noncompliance differentiate the decisions they cite in which equitable considerations were held to toll the time limit. In *Reeb* v. *Economic Opportunity Atlanta Inc.*, 516 F. 2d 924, 930 (5th Cir. 1975), the employer, by misrepresenting the facts that created the claim, misled the employee into not filing the charge in time. In *Dartt* v. *Shell Oil Company*, 539 F. 2d 1256, 1261-2 (10th Cir. 1977), affirmed by an equally divided court, 434 U. S. 99 (1977),

6. Language of 1540 English statute quoted in *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965). Similar language of the *Burnett* opinion was mentioned in the Title VII case of *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 238 (1976). Time limits are "practical and pragmatic devices to spare the courts from litigation of stale claims" and the defendant "from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp* v. *Donaldson*, 325 U. S. 304, 314 (1945).

where equitable considerations were held to have tolled the time limit of the Age Discrimination in Employment Act, the employee's filing delay was traceable to the employer's delay in giving information to the Labor Department. There were similar excuses for the employees' delays in other ADEA decisions cited (p. 6) by petitioners.[7]

B. No Implied Waiver in Pleading.

If compliance with the Title VII time limits is a prerequisite of jurisdiction of the subject matter, the petitioners as plaintiffs had a duty to plead compliance since Rule 8(a)(1) of the Federal Rules of Civil Procedure requires the complaint to state "the grounds upon which the court's jurisdiction depends." The respondent as defendant would not have waived it by not pleading it nor by an express concession.[8] The strength of this principle is illustrated by the exclusion of class members whose non-compliance with the Title VII time limit was *raised for the first time on appeal. Wetzel* v. *Liberty Mutual Ins. Co.*, 508

7. In *Kephart* v. *Institute of Gas Technology*, 581 F. 2d 1287 (7th Cir. 1978), where the employer had failed to post required notices of the existence of the act, the time limit was held to begin when the employee employed an attorney or had actual knowledge of his rights. There were similar facts in *Bonham* v. *Dresser Industries, Inc.*, 569 F. 2d 187 (3rd Cir. 1977), as well as discussions with the employer about other work that misled the plaintiff about his discharge. *Ott* v. *Midland-Ross Corp.*, 523 F. 2d 1367, 1370 (6th Cir. 1975), held an employer-induced excuse for non-compliance with the time limit was adequately pleaded by an allegation that the plaintiff was "fraudulently induced" not to assert his rights.

8. Lack of jurisdiction over the subject matter is not one of many matters (as statute of limitations) which Rule 8(c) directs to be "set forth affirmatively" in an answer nor which Rule 8(d) says "are admitted when not denied" in a required responsive pleading. Rule 12(b) provides that lack of jurisdiction over the subject matter, as six other listed matters, may be raised in the answer or by a motion made before pleading. But, after providing that some of the listed matters are waived unless pleaded and others may be raised later, a special provision of Rule 12(h)(3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

F. 2d 239, 248 n8 (3rd Cir. 1975). This Court denied a petition for certiorari in which waiver of the time limit was the sole issue sought to be reviewed. 421 U. S. 1011. In the present case, although the time limit requirement would not have been waived by not pleading it, noncompliance was an issue in the case from the beginning so that respondent never waived it, whether or not it is jurisdictional.

Compliance with the requirement for filing the EEOC charge was made an issue by respondent's answer in September 1970. The complaint alleged that on or about June 1, 1970 the plaintiff union had filed the EEOC charge (quoted above, footnote 2). Respondent's answer stated it was without knowledge or information sufficient to form a belief of this allegation (quoted above, footnote 3). This statement in the answer had the effect of a denial.[9] Issue was thus joined in 1970 on whether the petitioners had complied with the filing requirements of Title VII. Petitioners' contention of waiver by not pleading is thus without any basis, whether or not the time limit is jurisdictional.[10]

Petitioners' failure to comply with the time limit was a substantial reason for the 1971 settlement agreement which, if approved, would have given them prompt reinstatement but no backpay. At the hearing on the settlement in March 1972, as noted above, the then counsel for petitioners related how over 90% of the flight attendants (TWA and American Airlines' employees) terminated for pregnancy had made no protest about their discharge (II Supp. 319, 328, 335-6, 422, 455). Petitioners' present counsel, then representing objectors, discussed the number of class members affected by the Title VII time limit (Id. 422-3, 484). The issue of time limit compliance was

9. Rule 8(b), Federal Rules of Civil Procedure, provides that, if a party "is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial."

10. The Court of Appeals' statement that the respondent "failed to raise this issue in the pleadings" (A. 15) is correct only if it means that the respondent did not plead noncompliance as an "affirmative defense."

also discussed in the Court of Appeals briefs on the appeal from the order approving the settlement (See above, p. 3). Petitioners, opposing the settlement, argued that time limit noncompliance had to be pleaded by the defendant as an "affirmative" defense.

Accordingly, after the remand and at the first status call in September 1974, respondent took the precaution of a motion to amend the answer to plead noncompliance as an affirmative defense (III Supp. 25). The amendment, allowed in November 1974 (III Supp. 37), was clearly reasonable under the liberal practice for amending pleadings provided by Rule 15(a) of the Federal Rules of Civil Procedure. *Foman* v. *Davis,* 371 U. S. 178, 182 (1962). See *Emich* v. *General Motors,* 229 F. 2d 714 (1956), permitting a defendant to plead noncompliance with a time limit after remand for a new trial. Further, since the filing requirement had been raised in the answer and was involved in the settlement proceedings, the amendment was authorized by Rule 15(b)'s permission to plead by amendment, even after judgment, issues that had been tried but not pleaded.

The amendment did not possibly prejudice the petitioners. Their failure to comply with the time limit had occurred long before the suit was filed in 1970. The time limit issue had been known to petitioners' lawyers from the beginning of the case, as shown by the orginal pleadings and the settlement proceedings. Petitioners had not done anything in reliance on the fact that respondent's answer, though denying compliance with the filing requirement, had not pleaded it as an "affirmative" defense. Petitioners' attack on the pleading of noncompliance as an affirmative defense in the September 1974 amendment is too formalistic to warrant this Court's consideration.

Thus, since noncompliance with the filing requirement was pleaded twice over by the respondent and debated at the contested hearing on settlement approval by petitioners' present counsel, there is no basis for petitioners' contention that respondent waived it by failure to plead.

C. No Express Waiver nor Estoppel in Settlement Proceeding.

Petitioners' claims of waiver and estoppel mean that respondent, from the beginning of the litigation, had an improbable scheme to mislead them and the courts about the jurisdictional filing requirement of Title VII. The scheme, as petitioners picture it, was for respondent to conceal its intention of raising the requirement; to make an "explicit open-court waiver" and submit a settlement approval order that recited subject-matter jurisdiction; thus, in some way, to induce petitioners to appeal and overturn the settlement; and then, after disapproval, to destroy petitioners' Title VII remedies by raising the requirement. Their appeal did result in rejection of the settlement by the Seventh Circuit. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U. S. 993 (1974). But the record supports nothing else in petitioners' claims of waiver and estoppel. Their claims are *disproved* by facts they omit.

For the claimed express waiver, petitioners rely on the statement of respondent's counsel, "That is correct," when the judge asked him, "In other words, you are waiving any question of statute of limitations, if there is one?" This was said in the course of an explanation of the terms of the settlement (II Supp. 471-2). Petitioners' quotation (A. 28) of this and further remarks from the transcript are clarified by the two paragraphs omitted by petitioners (quoted above, footnote 4). Respondent's counsel explained that respondent was willing to settle the case, permitting all class members to return to work despite time limit noncompliance. But he also explained that, without the settlement, respondent would raise the issue of noncompliance against the 90 per cent of them whose right to go back to work was questionable.

The record proves that the customary recital of subject matter jurisdiction in the settlement approval order of March 17, 1972 could not have misled petitioners to their detriment. Again it is

significant that, at the hearing on approval of the settlement on March 13, petitioners' non-compliance with the time limit was discussed at length as a reasonable ground for the settlement (II Supp. 319, 328, 335-6, 442-3, 455, 471, 484). On March 20 a report to class members (the present petitioners) from their counsel stated that the time limit might prevent any recovery if the settlement order were reversed on appeal.[11] With these warnings to petitioners, not mentioned in the certiorari petition, respondent could not be charged with misleading them into appealing and obtaining disapproval of a settlement agreement which would have given them a remedy despite noncompliance with the time limit.

Petitioners' attempt to use concessions in the settlement proceedings to excuse their non-compliance with the time limit is contrary to the terms of the settlement,[12] to the evidence rule that statements made in settlement negotiations are not admissible,[13] and to the strong public policy favoring settlements.[14]

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11. Appendix of Appellants, Appeal No. 72-1335, pp. 72-9, Court of Appeals for Seventh Circuit, after referring to the 90-day time limit of Title VII, stated that "the claims of practically the entire class might be held to be untimely and barred in their entirety."

12. The settlement agreement provided it would be void if not approved by final judgment (I Supp. 36); that TWA's acceptance of it should not be construed as an admission; and that the terms of the settlement should not be offered nor received in evidence in any proceeding as an admission against the defendant (*id.* 34). Any statement about the time limit, as all other matters waived, was a "hypothetical or provisional concession conditioned upon the settlement's completion". Cf. *Hiram Ricker & Sons* v. *Students Intern. Soc.*, 501 F. 2d 550, 553 (1st Cir. 1974).

13. Rule 408 of the Federal Rules of Evidence (28 U. S. C. A., Fed. Rules of Ev. 161) states, "Evidence of conduct or statements made in compromise negotiations is . . . not admissible". The reason for the rule, stated in the Advisory Committee notes, is "promotion of the public policy favoring the compromise and settlement of disputes" (*id.* 163).

14. An unusually strong public policy favors the settlement of such large class actions as the one here. The opinion on the first appeal in this case noted, citing cases, that in Title VII cases there

(Footnote continued on next page.)

If the settlement had been sustained on appeal, respondent would have been precluded from setting it aside for the class members' noncompliance with the time limit, whether or not jurisdictional. With the settlement overturned, the settlement concessions became void.

These circumstances crucially differentiate the cases on which petitioners rely for equitable circumstances that would estop the respondent from asserting the time limit. In *Laffey* v. *Northwest Airlines*, 567 F. 2d 429 (D. C. Cir. 1976), cert. den. 434 U. S. 1086 (1978), the defendant did not raise the Title VII time limit until the plaintiffs, not knowing of the time limit obstacle, lost their rights under the Equal Pay Act. *Alger* v. *Hayes*, 452 F. 2d 841 (8th Cir. 1971), did not involve subject-matter jurisdiction as plaintiffs represent, but jurisdiction of the person of the defendant (see 452 F. 2d at 843), which is readily waived by a mere appearance. The statement in the opinion that the defendant had played "fast and loose" with the court was based on defendant's attack on service of summons on appeal when he had represented before trial that a verdict would be paid. In *DiFrischia* v. *New York Central Railroad*, 279 F. 2d 141 (3rd Cir. 1960), a defendant was estopped to attack diversity jurisdiction after the time limit had expired because he had stipulated to the factual basis of diversity during the time limit.[15]

The Court of Appeals, while stating that the *Alger* and *DiFrischia* cases did not involve jurisdictional time limits, referred to the differentiating facts relied on to prove estoppel (A16-7). The Court of Appeals implied that the facts in the

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(Footnote continued from preceding page.)
is great emphasis on private settlement and the elimination of unfair practices without litigation. *ALSSA* v. *American Airlines*, 455 F. 2d 101, 109 (1972).

15. The case has been limited as a precedent by this crucial fact. See *Stapleton* v. *United States*, 454 F. 2d 1210 (3rd Cir. 1972) *cert. denied*, 409 U. S. 894; *Joyce* v. *United States*, 474 F. 2d 215, 218 n. 1 (3rd Cir. 1973); *Travis Mills Corp.* v. *Square D Co.*, 67 F. R. D. 22, 24-27 (E. D. Pa. 1975), which contains a full analysis of the cases.

present case did not prove the estoppel claimed by the petitioners.

The record thus disproves the factual basis of petitioners' waiver and estoppel claims so completely that (1) the lower courts were right in rejecting them and (2) the remand they request could not develop facts to support them. Further, petitioners' use of settlement concessions as a basis for estoppel and waiver is contrary to elementary legal principles.

II.

Conflict in Circuits Not Significant.

The Court of Appeals' opinion, after discussing petitioners' other time limit contentions, rejected (A15-17) their arguments that respondent had waived petitioners' noncompliance and was estopped to raise the requirement by delays in doing so. The opinion stated that the 90-day filing period is jurisdictional and therefore failure to raise it "does not constitute a waiver, nor is the employer estopped from raising it." For the jurisdictional nature of the requirement, the opinion cited decisions of this Court, Seventh Circuit decisions, and, saying that other circuits "are split on this issue," decisions of the District of Columbia and Tenth, Third, Fifth, and Eighth Circuits. The petition for certiorari cites District of Columbia and Fifth Circuit cases as on one side and Seventh and Eighth Circuit cases on the other. The petition also cites cases for a statement that the time limit in the ADEA is not jurisdictional. But the holdings in the cases cited by petitioners and the Court of Appeals are not contrary to the decision here.

This Court,[16] many Courts of Appeals,[17] and District Courts too numerous to mention have stated clearly that the two Title

16. *Alexander* v. *Gardner-Denver*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973); *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229, 239-40 (1976); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 555 (1977).

17. *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806, 808 (1975); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (1972); *Choate* v.

(Footnote continued on next page.)

VII time limits are jurisdictional prerequisites. The time limits in the NLRA and the ADEA are not analogous, as petitioners contend. There was no time limit in the NLRA when it was enacted in 1935. It was the Taft-Hartley Act in 1947 that first provided that the board should not issue a complaint on any unfair labor practice occurring more than six months before filing the charge. See *NLRB* v. *Local 264*, 529 F. 2d 778, 782-3 (8th Cir. 1976). Compliance with the time limit was not a condition of subject matter jurisdiction since the original act provided for the remedy without the time limit. Differences between the ADEA and Title VII that would account for treating the filing requirements of the former as jurisdictional prerequisites, but not those of the latter, are explained in *Gabriele* v. *Chrysler Corp.*, 573 F. 2d 949, 951-4 (6th Cir. 1978). Further, when the ADEA was amended by lengthening the time limits, they were expressly stated in Congress to be non-jurisdictional, as explained in *Kephart* v. *Institute of Gas Technology*, 581 F. 2d 1287, 1289 (7th Cir. 1978). Nothing similar occurred when the Title VII time limits were amended in 1972. See below, footnote 19.

Despite petitioners' contrary statements (pp. 7-9), the legislative history is significant, showing that Congress wished to protect the federal courts from the expected flood of claimants who had not complied with the Title VII time limits. The mere enactment of the unusually brief time limits in Title VII is evidence of a strong congressional purpose to restrict Title VII

(Footnote continued from preceding page.)

Caterpillar Tractor Co., 402 F. 2d 357 (1968); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F. 2d 239 (3rd Cir. 1975), *cert. denied*, 421 U. S. 1011 (1975); *Griffin* v. *Pacific Maritime Assoc.*, 478 F. 2d 1118 (9th Cir. 1973), *cert. denied*, 414 U. S. 859; *East* v. *Romine, Inc.*, 518 F. 2d 332, 336 (5th Cir. 1975); *Goodman* v. *City Products Corp.*, 425 F. 2d 702, 709 (6th Cir. 1970); *Olson* v. *Rembrandt Printing Co.*, 511 F. 2d 1228, 1231 (8th Cir. 1975); *Hinton* v. *CPC International*, 520 F. 2d 1312, 1315 (C. A. 8, 1975); *Revere* v. *Tidewater Tel. Co.*, 485 F. 2d 684 (4th Cir. 1973); *Stebbins* v. *Continental Ins. Co.*, 442 F. 2d 843 (D. C. Cir. 1971); *Vigil* v. *American Tel. & Tel. Co.*, 455 F. 2d 1222 (10th Cir. 1972).

remedies. The time limits, progressively more restrictive with changing versions of the legislation, emphasize that Congress intended to draw a firm line that would permit only the diligent claimant to recover.[18] Under the 1972 amendments to the 1964 Act, extending the periods for filing the EEOC charge from 90 to 180 days and for the court action from 30 to 90 days, the time limits remain relatively short.[19]

Despite differences in language, the principles of law applied on both sides of the asserted "split in the circuits" are substantially the same.

Reeb v. *Economic Opportunity Atlanta, Inc.*, 516 F. 2d 924 (5th Cir. 1975), is a leading case, cited both by the petitioners and the Court of Appeals as holding the time limit not to be jurisdictional. But the *Reeb* opinion implied that the time limit was jurisdictional for some purposes. After mentioning Courts of Appeals' decisions, the opinion (p. 928) stated a "conclusion" that the 90-day time limit of Title VII

> "is not jurisdictional in *the sense that* compliance with it *vel non* determines the jurisdiction of the district court, *without respect to any of the other circumstances in a particular case*. We accept the view that the requirement

18. The original bill that later became Title VII in 1964 provided a six months period after an unlawful practice for filing the charge with the EEOC although a one-year provision had been included in otherwise identical language in a 1962 bill in the House (EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, pp. 2012, 2167). A later so-called "leadership compromise" between Senators Dirksen and Mansfield, which took away the EEOC's power to file suit, reduced the time limit from six months to the final provision of 90 days for the employee's EEOC charge and 30 days for the District Court action (*Id.* 3018). In *Moore* v. *Sunbeam Corporation*, 459 F. 2d 811, 821 (C. A. 7, 1972), Judge Stevens referred to the "extremely short limitations period on private claims" as a part of the Dirksen-Mansfield compromise that made it possible to enact the statute.

19. The Congressional discussion of the 1972 amendments indicates a serious concern about the congestion of cases in the EEOC as well as in the federal courts. Legislative History of Equal Employment Opportunity Act of 1972, Senate Committee on Labor and Public Welfare (pp. 63, 1505-16, 1528-32).

> should be *analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here*".

The opinion referred elsewhere to

> "Our view that the ninety day requirement is not jurisdictional *in the strict sense of the term*" (p. 928)

and stated that this Court (as in *Love* v. *Pullman Co.*, 404 U. S. 522, 1972) and the Fifth Circuit "have not treated time limitations contained in Title VII . . . as *inflexible jurisdictional absolutes*" (p. 929).*

In another case cited by petitioners and the Court of Appeals to show a conflict in the circuits, *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429 (D. C. Cir. 1976), *cert. den.* 434 U. S. 1086 (1978), the jurisdictional prerequisite of the time limit, though stated, was modified for some purposes. The opinion explained that the Supreme Court and Courts of Appeals "like most others—have referred to the timely-filing requirement as a jurisdictional prerequisite" (p. 474), but that "neither has ever had occasion to focus on the question whether courts are precluded from invoking traditional equitable doctrine to modify the requirement." The holding was stated to be (p. 475) that the 90-day provision for filing the charges "is not a jurisdictional absolute." The court then proceeded to find from the facts that the defendant was estopped (See above p. 11).

The language of the *Reeb* and *Laffey* opinions thus shows petitioners are wrong when they say (p. 6), as a necessary step in their argument of circuit conflict, that in those cases "the Fifth and District of Columbia Circuits ruled that the § 706(d) requirement is a 'statute of limitations' rather than a 'jurisdictional prerequisite.' " The opinions did not declare the Title VII time limits to be no more than a "statute of limitations." They called them "analogous to a statute of limitations" and said they

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* The italics in the *Reeb* quotations are added.

were not "strict jurisdictional absolutes" and so could be tolled or modified for equitable reasons.

Petitioners are wrong again when they treat the distinction between a statute of limitations and a jurisdictional prerequisite as an either-or difference which is open in the Second Circuit[20] and which has been held invariably jurisdictional in the Eighth Circuit.[21] The Eighth Circuit, as shown in the footnote, has cited with approval the Fifth Circuit's *Reeb* decision, which petitioners say is on the other side of the claimed circuit conflict. Yet after *Reeb* the Fifth Circuit in *East* v. *Romine*, 518 F. 2d 332, 336-7 (1975), reiterated the jurisdictional nature of the filing requirement, but as in the Eighth Circuit dismissed the complaint for noncompliance because the equitable considerations of *Reeb* were not present. And the Fifth Circuit recently stated that the filing requirement of Title VII was a jurisdictional prerequisite. *Green* v. *Forney Engineering Co.*, 19 EPD ¶ 9007 (Feb. 1979).

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20. *Smith* v. *American President Lines, Inc.*, 571 F. 2d 102, 109 (2nd Cir. 1978), noted that this Court in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229, 237 n. 10 (1976), had denominated the Title VII time limit as jurisdictional but had none-the-less distinguished the case "from instances of a party being prevented from asserting his rights." This was said to open the possibility that "in certain situations tolling of the Title VII time limits might be acceptable". The opinion concluded that, if tolling is permissible, "the circumstances here . . . fall far short of the equitable considerations which would prompt our interference with the Title VII time limitations provided by Congress". (p. 109.)

21. In *Hinton* v. *CPC International, Inc.*, 520 F. 2d 1312, 1315 (8th Cir. 1975), where the time limit for filing the court action had been extended by agreement, the time limit was said to be jurisdictional and not extendable. But the opinion explained that the plaintiff had "failed to comply with the filing period extensions agreed to" (1315 n. 7) and the complaint was dismissed. Plaintiffs cite this case to show a conflict between the Eighth and Fifth Circuits, citing *Reeb* for the Fifth. But in *Wells* v. *Sherwood Medical Industries*, 549 F. 2d 1170 (1977), the Eighth Circuit, in an opinion by Judge Heany, who was on the *Hinton* court, said the filing time was jurisdictional but should be interpreted in accord with the "broad remedial purposes" of Title VII. For this the Eighth Circuit's opinion cited the Fifth Circuit's *Reeb*, which petitioners say conflicts with the Eighth Circuit.

Thus, although some passages in federal court opinions (as in the petition for certiorari) have spoken of the Title VII requirement as if it had to be labeled either "statute of limitations" or "jurisdictional prerequisite", the holdings show that the labels are an oversimplification. Any statute that limits the time for commencing litigation is in a sense a statute of limitations, the common example being the general limitation acts that apply everywhere to common law causes of action. If a statute creating a remedy imposes a specific time limit for filing the action, compliance with the time limit may be intended to be a prerequisite to the court's jurisdiction. As noted above, this Court and the other federal courts have repeatedly stated that the filing of an EEOC charge, within a stated time limit after the occurrence of the alleged illegal practice, and the receipt of a right-to-sue letter, within a stated time before the federal court action is brought, are jurisdictional prerequisites of the court action. But whether the time limit is called "statute of limitations" or "jurisdictional prerequisite", the federal courts modify the requirement by reason of equitable considerations [*The Harrisburg*, 119 U. S. 199, 214 (1886)], fraudulent concealment [*Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1945)], or estoppel [*Glus* v. *Brooklyn Eastern Terminal*, 359 U. S. 231, 234-5 (1959)].

In the present case the Court of Appeals stated that the filing requirement is a jurisdictional prerequisite and therefore the employer is not estopped from raising it (A. 16). But the opinion then mentioned the facts relied on by petitioners for waiver and estoppel. The court said it was "questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned." The court also differentiated the estoppel decisions cited by petitioners as involving a situation in which the defendant filed a stipulation admitting jurisdiction and then, after the statute of limitations had run, raised the issue of lack of jurisdiction (A. 17). The opinion, while indicating equitable considera-

tions were not controlling since the requirement was jurisdictional, nevertheless described the facts in such a way as to show the court's belief that there were in fact no equitable considerations to estop the respondent.

Thus the Courts of Appeals, despite the imprecise legal theories stated in some opinions, have taken equitable considerations into account in deciding whether the Title VII filing requirements would be applied as jurisdictional prerequisites. The requirements remain jurisdictional for someone who has no equitable excuse for noncompliance. The Court of Appeals' opinion in this case is consistent with this result. So are the holdings and much of the discussion in *Reeb* and *Laffey* which, refusing to apply the requirement as an inflexible jurisdictional absolute in the face of equitable considerations, imply that it otherwise remains a jurisdictional prerequisite. The asserted conflict in the circuits amounts at most to inconsistent language and not the substantial difference in holdings that warrants review under this Court's Rule 19(1)(b).

CONCLUSION.

If certiorari were granted as prayed by petitioners in this Docket No. 78-1545, the issue they raise would not have to be decided. For the record clearly disproves the facts of the waiver and estoppel by which they seek to excuse their failure to comply with the Title VII filing requirement. Further, the legal principles actually applied in the circuits are not in conflict despite the inconsistent language of some opinions.

Respondent urges denial of the certiorari petition so that this litigation, begun in 1970, may proceed to prompt disposition

in the District Court, as explained in respondent's conditional cross-petition for certiorari in Docket No. 78-1549.

Respectfully submitted,

JAMES A. VELDE,
One First National Plaza,
Chicago, Illinois 60603,
Attorney for Respondent.

Of Counsel:
LAURENCE A. CARTON,
GARDNER, CARTON & DOUGLAS.